

**38 CFR Part 39****RIN 2900-AR71****Statutory Increase in Operations and Maintenance Grant Funding****AGENCY:** Department of Veterans Affairs.**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is amending its regulations that govern Federal grants to establish, expand, improve, or operate and maintain veterans' cemeteries. This final rule implements new statutory amendments to increase the maximum amount of grants to States and Tribal Organizations to operate and maintain veterans' cemeteries as authorized by section 2206 of the "Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020" (the Act). Effective on January 5, 2021, the maximum amount of operation and maintenance grants increased from \$5 million to \$10 million. This final rule implements that statutory change. Additionally, VA is revising the date by which the list of approved pre-applications is prioritized for fiscal year funding from August 15 to October 1 each year.

**DATES:** This rule is effective [Insert date of publication in Federal Register].

**FOR FURTHER INFORMATION CONTACT:** George Eisenbach, Director of Veterans Cemetery Grants Program, National Cemetery Administration (41E), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Telephone: (202) 632-7369 (This is not a toll-free telephone number.)

**SUPPLEMENTARY INFORMATION:** This final rule amends 38 CFR part 39 to conform with statutory amendments made by section 2206 of Public Law 116-315, the

“Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020” (the Act). The Act amended Section 2408(f)(2) of title 38, United States Code (U.S.C.) to increase the maximum amount of grants VA could award for operating and maintaining Veterans’ cemeteries from \$5 million to \$10 million.

To implement this authority, VA is revising regulatory text to replace “\$5 million” with “\$10 million” every place it appears in 39 CFR 39.3 and 39.80. Specifically, VA is revising the information for Priority Group 4 operation and maintenance grants in existing 38 CFR 39.3(c) to update the reference to the maximum grant awards to be made in any fiscal year from \$5 million to \$10 million. Similarly, we are revising the grant award information in § 39.80(a)(2) and (b) to clarify that operations and maintenance grants for Priority Group 4 projects must not result in a payment of more than \$10 million.

In § 39.3(d), VA is replacing “By August 15 of each year” with “By October 1 of each year” to align the date for finalizing the prioritization of preapplications to the beginning of the fiscal year in which the associated final grant applications will be eligible for award. The August 15 date is not required by statute, but instead was a self-imposed deadline for finalizing the priority listing of preapplications when the grant program was first established. Since then, the number of preapplications has grown, and VA needs the additional time to conduct the final prioritization. VA publishes this date in regulation to ensure transparency and awareness of the process within the interested grant community.

Preapplications are accepted and evaluated on a rolling basis; however, only those preapplications that were received on or before July 1 of the current fiscal year are eligible for consideration in the prioritization process for the upcoming/next fiscal year. The preapplication process serves as a means to determine whether the proposed project conforms to statutory and regulatory requirements. If the preapplication is

conforming, VA notifies the State or Tribal Organization that the preapplication has been found to meet the requirements, and the proposed project is included in the prioritization.

This change from August 15 to October 1 for finalizing the prioritization list expands VA's timeframe for conducting the prioritization of preapplications by approximately 45 calendar days. This does not affect a grant applicant's ability or opportunity to submit a final grant application for the fiscal year in which it is eligible for award and does not affect timeframes for awarding grants. Applicants may begin preparing final grant applications at any time and may submit the final application at any time. The October 1 date is merely the announcement of the priority of proposed projects based on preapplications and reflects the order in which those projects will be awarded and funded. Additionally, publishing this date in regulation is primarily informational for grant applicants and is not related to any subsequent deadlines that would affect applicants. VA works with grant applicants throughout the final application process to award grants based on priority and available funding in accordance with 38 CFR Part 39.

#### Administrative Procedure Act

The Secretary of Veterans Affairs finds that there is good cause under the provisions of 5 U.S.C. 553(b)(B) to publish this rule without prior opportunity for public comment and dispense with the 30-day delay for the effective date of a rule under 5 U.S.C. 553(d)(3). Pursuant to section 553(b)(B) of the Administrative Procedure Act, general notice and opportunity for public comment are not required with respect to a rulemaking when an "agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure

thereon are impracticable, unnecessary, or contrary to the public interest.” Pursuant to section 553(d)(3), an agency may “for good cause found” dispense with the 30-day delay in the effective date of a rule. Because the increased grant amount is authorized by law and effective immediately, the Secretary finds that it is unnecessary to delay issuance of this rule for the purpose of soliciting prior public comment or to delay the rule’s effective date. By statute, Congress has imposed a cap on the amount that VA expends for operation and maintenance grants, and VA regulations provide that VA will award operations and maintenance grants up to, but not exceeding, that cap. VA is not changing its policy of awarding operation and maintenance grants up to the statutory cap, but merely updating the regulation to reflect the statutory cap now in effect. See *Hadson Gas Sys. v. FERC*, 75 F.3d 680, 684 (D.C. Cir. 1996) (finding that the act of amending regulatory language to reflect statutory changes does not require an agency to engage in notice and comment with respect to unchanged aspects of the regulatory scheme).

#### Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866.

The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at [www.regulations.gov](http://www.regulations.gov).

#### Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-612, is not applicable to this rulemaking because notice of proposed rulemaking is not required. 5 U.S.C. 601(2), 603(a), 604(a).

#### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

#### Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

#### Assistance Listing

The Catalog of Federal Domestic Assistance program number and title for this final rule is 64.203, Veterans Cemetery Grants Program.

#### Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 39

Cemeteries, Grant Programs-veterans, Veterans.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved this document on December 22, 2022, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

**Jeffrey M. Martin,**

*Assistant Director,*

*Office of Regulation Policy & Management,*

*Office of General Counsel,*

*Department of Veterans Affairs.*

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 39 as set forth below:

PART 39 – AID FOR THE ESTABLISHMENT, EXPANSION, AND IMPROVEMENT, OR OPERATION AND MAINTENANCE, OF VETERANS CEMETERIES.

1. The authority citation for Part 39 continues to read as follows:

AUTHORITY: 38 U.S.C. 101, 501, 2408, 2411, 3765.

Subpart A – General Provisions

2. Amend § 39.3 by revising paragraphs (c) and (d) to read as follows:

**§ 39.3 Priority list.**

\* \* \* \* \*

(c) Grants for projects within Priority Group 4 will be awarded in any fiscal year only after grants for all project applications under Priority Groups 1, 2, and 3 that are ready for funding have been awarded. Within Priority Group 4, projects will be ranked in priority order based upon VA's determination of the relative importance of proposed improvements and the degree to which proposed Operation and Maintenance Projects achieve NCA national shrine standards of appearance. No more than \$10 million in any fiscal year will be awarded for Operation and Maintenance Projects under Priority Group 4.

(d) By October 1 of each year, VA will make a list prioritizing all preapplications that were received on or before July 1 of that year and that were approved under § 39.31 or § 39.81, ranking them in their order of priority within the applicable Priority Group for funding during the fiscal year. Preapplications from previous years will be re-prioritized each year and do not need to be resubmitted.

(Authority: 38 U.S.C. 501, 2408)



3. Amend § 39.80 by revising paragraphs (a)(2) and (b) to read as follows:

**§ 39.80 General requirements for a grant.**

(a) \* \* \*

(2) Its project must be ranked sufficiently high within Priority Group 4 as defined in § 39.3 for the applicable fiscal year so that funds are available for the project, and a grant for the project must not result in payment of more than the \$10 million total amount permissible for all Operation and Maintenance Projects in any fiscal year;

\* \* \* \* \*

(b) VA may approve under § 39.85 any Operation and Maintenance Project grant application up to the amount of the grant requested once the requirements under paragraph (a) of this section have been satisfied, provided that sufficient funds are available, and that total amount of grants awarded during any fiscal year for Operation and Maintenance Projects does not exceed \$10 million. In determining whether sufficient funds are available, VA shall consider the project's ranking in Priority Group 4; the total amount of funds available for cemetery grant awards in Priority Group 4 during the applicable fiscal year; and the prospects of higher-ranking projects being ready for the award of a grant before the end of the applicable fiscal year.

(Authority: 38 U.S.C. 501, 2408)